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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1638

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Conditional Cross-Petitioners,

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Respondents.

On Conditional Cross-Petition For
Writ of Certiorari to the Supreme Court
of the State of Wisconsin

BRIEF FOR RESPONDENTS IN OPPOSITION

Jack D. Walker
James K. Ruhly
MELLI, SHIELS, WALKER & PEASE, S.C.
119 Monona Avenue
Madison, Wisconsin 53703
Telephone: (608) 257-4812
Attorneys for Respondents

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The cross-petitioners have not sought independent review of the decision below, but have filed a cross-petition for certiorari asking that certain issues be considered only in the event certiorari is granted petitioners in No. 74-1606, who are Respondents, here. Respondents oppose the conditional cross-petition on the grounds that it presents no unresolved federal question except the question for which review is sought in No. 1606.

STATEMENT OF THE CASE

An accurate statement of the case appears in the Petition for a Writ of Certiorari in No. 74-1606. Conditional cross-petitioners' statement confuses the holding below. Only one aspect of the procedure followed by the school board was at issue below: "the lack of an impartial decisionmaker." (p. App. 21)* The holding was:

> "The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity. This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget. They were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop. We conclude that the board was not an impartial decisionmaker in a constitutional sense and that the appellants were denied due process of law." (p. App. 23-24)

*References are to the Wisconsin Supreme Court's opinion. Pagination is to the appendix to the Conditional Cross-Petition for a Writ of Certiorari.

The Wisconsin Supreme Court held that the discharged teachers were entitled to bring an action for a determination whether "a more reasonable response" could have been made than terminating the illegally striking teachers. (p. App. 10-11, 26). The Wisconsin Court did not hold that the discharges were not reasonable.

ARGUMENT

I.

THE CONDITIONAL CROSS-PETITION RAISES NO SUBSTANTIAL FEDERAL QUESTION EXCEPT THAT *MORRISSEY* WAS SERIOUSLY MISCONSTRUED.

On the due process issue conditional cross-petitioners seek review only of the remedy fashioned by the Wisconsin Supreme Court.

> "We believe the school board should make the initial determination as to the hiring or firing of one or many teachers. In those situations where due process is required, namely where the employed teacher's property right or liberty is at stake—notice, a hearing and a statement of reasons should be given. As much control as possible should be left with the school board to set policy and manage the school.
>
> "In those situations where an employed teacher is discharged or otherwise disciplined and due process is required, and the school board is in an adversary position, we hereby provide and direct that the dissatisfied teacher or teachers can, upon petition, ob-

tain a *de novo* determination of all issues in any court of record in the county where the school district or a part of it is located. . . .

. . . .

"This method of disposition is not ideal because a court may be required to make public policy decisions that are better left to a legislative or administrative body."

The above procedure is the act of the highest court of the State of Wisconsin taken under state constitutional provisions. Conditional cross-petitioners recognize that they are not entitled to review of that state law question in this Court. Thus, it is argued that the ordered procedure constitutes denial of due process because it does not void the board's initial action and order reinstatement with backpay effective April 5, 1974. (Conditional Cross-Petition, p. 16). Acceptance of conditional cross-petitioners' argument invalidates the procedure created by the Wisconsin Supreme Court.[1] Conditional cross-petitioners' claim that due process is denied unless they are reinstated with backpay from April 5, 1974, underscores the Wisconsin Supreme Court's serious misconstruction of *Morrissey v. Brewer*, 408 U.S. 471 (1972). Petitioners' argument as-

[1]The present Wisconsin Supreme Court decision prevents the replacement of illegally striking teachers, apparently until a trial-type hearing involving the preparation, presentation and evaluation of everything that was considered or discussed by either side in negotiations occurs. Such a proceeding at the least would be expensive and time consuming. Meanwhile, the children cannot go to school. The proceeding before the state court is a stopgap measure. The Court's decision actually requires the legislature to create yet another government agency. The agency's budget would be staggering. Teacher contract negotiations normally occur simultaneously throughout the state because of uniform budget deadlines. A large staff would be necessary just to handle teachers, not considering all other public employees. Delay is unavoidable if trial-type procedures are used. Again the schools would remain closed pending litigation of all conduct at negotiations.

sumes, as did the Wisconsin Supreme Court, that *Morrissey* required a decision-maker other than the school board at any pretermination hearing. From that premise it is urged that the board's action in terminating the illegally striking teachers in order to reopen the schools with replacement teachers is void. The argument then leaps to a demand for reinstatement and backpay on the assertion that a post-termination review of the board's action fails to accord a hearing at a "meaningful time." (p. 15-16, Conditional Cross-Petition)

Morrissey v. Brewer does not determine how to balance the interests of the community in educating their children against the interests of the illegally striking teachers in an expanded procedure.

By retaining the board's involvement in the new procedure the Wisconsin Court can only have meant that the state's interest in a reasonably efficient procedure overbalanced the affected individuals' interest in a panoply of procedural rights that includes a decisionmaker which is not accountable to the taxpayers and parents of the school district.

The teachers' interest in adjudicative procedures is to insure that there is not an incorrect determination of the facts, *i.e.* whether they are striking. Here it was admitted that an illegal strike was occurring, each teacher was asked twice to return to work, (p. App. 2-3) and then a hearing was held. The risk of an erroneous decision was negligible.

The mistaken reliance on *Morrissey* stems from conditional cross-petitioners' semantics. The terminations are labeled punitive by cross-petitioners. By using the label, "punitive", teachers seek to separate the termination from the fact that at the time of the terminations, the schools

were closed because of the strike. The teachers were *not* terminated *after* they returned to work.[2] The termination resulted from the current and future conduct of refusing to work. *Morrissey* involves a parolee being punished for *prior* conduct. This Court's concern was that parolee have an opportunity to show the facts surrounding his prior conduct that might possibly warrant mitigating parole revocation.

In providing for an opportunity to show the mitigating facts traditionally involved in criminal proceedings in *Morrissey*, we doubt that this Court meant to invite the situation presented here. The teachers made no attempt to mitigate their unlawful conduct. Twice before the hearing the teachers were invited to return to work. They refused. They refused again at the hearing. They were still on strike a week later though aware that the school board was trying to reopen the schools by hiring replacements. (p. App. 5, n. 2). Nothing in *Morrissey* can be read as approving a parolee's knowing and continued parol violations.

The mitigating circumstances envisioned in *Morrissey* are such facts as show that the parolee, knowing that specified conduct is inconsistent with his parole and having control over that conduct, would not continue to or again violate his parole. This Court in *Morrissey* did not indicate that the parole board, which approved the release and established the parole conditions, was prohibited by procedural due process from evaluating such evidence. The parole board's role as decisionmaker was expressly

[2]The trial court found the teachers to be illegally striking on April 11, 1974, a week after this action was started. (p. A-77.) (Reference is to the Circuit Court decision on conditional cross-petitioners' application for a temporary restraining order. Reprinted in the appendix to the Petition for a Writ of Certiorari in No. 1606.)

approved. Nothing in *Morrissey* even suggests that the parolee's procedural due process rights include a decisionmaker unassociated and uninvolved with the parole system or that the parolee is constitutionally entitled to a decisionmaker who is not accountable for representing the interests of the parol system. See *Withrow v. Larkin*, 43 U.S.L.W. 4459 (April 16, 1975).

In this case the court below, and conditional cross-petitioners here, erroneously read *Morrissey* as requiring a decisionmaker who is not accountable (by election) to the taxpayers, parents and children of the school district. Such intimations were deliberately avoided by this Court in *Morrissey*. The same due process attack on the right of a school board to terminate illegally striking teachers was rejected by the Supreme Court of Michigan. *Rockwell v. Board of Education of Crestwood School Dist.*, 393 Mich. 616, 227 N.W.2d 736 (1975).

The remedy fashioned by the Wisconsin Supreme Court demonstrates that *Morrissey* was misconstrued. Having held that *Morrissey* meant the school board was a constitutionally defective decisionmaker, the court nonetheless refused to entirely exclude the school board from the initial decision because:

> "When the teachers went on strike, the school board was undoubtedly faced with a situation that needed immediate attention. Clearly, it had a duty to keep the schools open and staff them with competent teachers. If the schools were closed so that the statutory minimum number of school days was not reached, monetary state school aid would have been denied or jeopardized leading to a severe budget crisis."

The above is simply a frank recognition that the school

board's interest in educating the children, with replacement teachers if necessary, is more important than the interest of illegally striking teachers in protecting a property interest that they voluntarily chose to forego.

Having misread *Morrissey* and unnecessarily circumscribed the discretion of the school board, but recognizing the importance of the governmental interest at stake, the Court below could only accommodate the resulting inconsistency by remanding to the trial court to determine if a "more reasonable" course of action could have been followed. Without the mistaken interpretation of *Morrissey*, this suit would be at an end and the court-legislated procedure would be unnecessary.

Finally, assuming *arguendo* that the result reached by applying *Morrissey* is correct, conditional cross-petitioners have not been denied due process of law. Restoration of the *status quo* of April 5, 1974, has no bearing on the opportunity for a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Monzo*, 380 U.S. 545, 552 (1965).

On April 5, 1974, conditional cross-petitioners were on strike. They were not being paid because they were refusing to work. They are still on strike, since there has been no unconditional offer to return to work. Restoration of the status quo could be restoration of an illegal strike and closed schools. It's not clear that conditional cross-petitioners are in any way harmed by nonreinstatement, much less that they are irreparably harmed. Procedural due process does not mean that to protect conditional cross-petitioners from the negligible possibility that their termination was illegal, the children of the school district are again to have their education interrupted. *Cf. Goss v. Lopez*, 43 U.S.L.W. 4181 (Jan. 22, 1975).

II.

NO SUBSTANTIAL UNRESOLVED FEDERAL QUESTION IS PRESENTED BY CONDITIONAL CROSS-PETITIONERS' EQUAL PROTECTION CLAIM.

Conditional cross-petitioners also seek review of the Wisconsin Supreme Court's holding that public employees, including teachers, are not denied equal protection *vis a vis* other public employees because the statutory collective bargaining rights accorded such employees do not include the right to invoke compulsory arbitration, which is available to police and fire personnel.

Conditional cross-petitioners concede that the more intimate connection to public health, safety and welfare of police and fire personnel:

> "might create a rational relationship between the classification of police and firemen separately from other public employees and the object sought to be achieved, that is the safety and health of the citizens." (Conditional Cross-Petition, p. 20).

A legislature could rationally conclude that unlawful strikes by police and fire personnel pose a greater danger to public health, safety and welfare than other public employee strikes. Providing a compulsory dispute resolution procedure in the interest of avoiding that greater harm to the public is hardly irrational or arbitrary. Where a fundamental right[3] or suspect classification is not involved, a classification that is not irrational or arbitrary does not violate the equal protection clause. *E.g. McGinnis v. Roy-*

[3]That the right to strike is not a fundamental interest has been settled. *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971), *affirmed*, 404 U.S. 802 (1971).

ster, 410 U.S. 263, 276 (1973). Also, a legislature may address a problem one step at a time or even select one phase of a field and apply a remedy there, neglecting the others. *Dandridge v. Williams,* 397 U.S. 471, 486 (1970); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955).

To say that the public health, safety and welfare would be immediately and irreparably harmed by a strike of police and fire personnel is not to say, as conditional cross-petitioners assert, that strikes by other public employees have no serious impact on public health, safety and welfare. Further, the proposition that prohibiting public employees, whether "essential" or "nonessential," from striking denies them equal protection has been uniformly rejected by numerous state and federal courts, as well as this Court. See Annot., 37 A.L.R.3d 1147 (1971); *United Federation of Postal Clerks v. Blount, supra.*

CONCLUSION

The due process question presented by this conditional cross-petition emphasizes the incorrectness of the Wisconsin Supreme Court's resolution of the due process claim and the harm that decision causes. Nor does this cross-petition present a federal equal protection question warranting this Court's attention.

July, 1975.

Respectfully submitted,

JACK D. WALKER
JAMES K. RUHLY
MELLI, SHIELS, WALKER & PEASE, S.C.
119 Monona Avenue
Madison, Wisconsin 53703